LT-LMC Resources JV Sdn Bhd v Angkasa Tiram Sdn Bhd

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22–1638 OF 2008
SEE MEE CHUN J
15 APRIL 2014

Contract — Breach — Termination — Whether multifarious claims arising between parties — Whether it was task of trial court to determine which parts of claim and counterclaim allowable

The plaintiff was awarded a contract for RM6.8m ('the contract sum') by a third party ('Amsteel') to carry out excavation works on a river-straightening project. The plaintiff assigned the contract to the defendant. Under that subcontract, the plaintiff was to pay the defendant the contract sum less 5%. In its instant claim, the plaintiff sought the refund of RM716,837.50 it had overpaid the defendant and for RM446,081.38 it had expended on the defendant's behalf. The plaintiff also claimed for 5% of the balance contract sum on the ground it lost its entitlement to the 5% due to the defendant's failure to complete the project resulting in Amsteel terminating the main contract with the plaintiff. The defendant denied the claims and counterclaimed for unpaid monies under the subcontract, damages for its termination, return of monies paid for the purchase of three machines from the plaintiff and damages for retention by the plaintiff of the defendant's equipment and machinery.

Held, allowing both the claim and counterclaim in parts:

(1) There was no evidence to show an overpayment had been made to the defendant. With regard to expenses incurred by the plaintiff on the defendant's behalf, there was admission by the defendant that it owed the plaintiff a sum of RM284,533.95. The disputed items of expenses concerned survey work, general welding, purchase of pontoon and site-office expenses. Only the expenses incurred for survey work and general welding were allowed. There was no proof of purchase of the pontoon and no proof of site-office expenses incurred (see paras 7–8).

(2) As a result of the termination of the main contract and the assignment due to the defendant's poor performance, the plaintiff was entitled to 5% of the balance contract sum of RM2,602,755.78. This figure was derived by deducting the final certified contract sum of RM4,160,494.22 from the initial contract sum of RM6,763,250. It followed that the defendant was not entitled to damages for the termination (see paras 10–11 & 20).

(3) The plaintiff's reason that they detained the defendant's machinery only because they wanted the defendant to refund the overpayment and expenses incurred on the defendant's behalf did not make the detention lawful. However, as the defendant had only proved the fact of loss, but not the damages, nominal damages of RM50,000 was allowed for the detention of the machinery and RM1,000 to repair damaged machinery. Similarly, nominal damages of RM10,000 was allowed for loss of the pontoon. The defendant's claim for refund of RM551,262 it had paid to buy three of the plaintiff's machines and its claim for RM266,658.88 being unpaid balance of the contract sum were also allowed (see paras 12, 14, 18 & 19).

[Bahasa Malaysia summary

Plaintif diawardkan kontrak untuk RM6.8 juta ('jumlah kontrak tersebut') oleh pihak ketiga ('Amsteel') untuk menjalankan kerja-kerja penggalian bagi projek meluruskan sungai. Plaintif memberikan kontrak tersebut kepada defendan. Di bawah subkontrak tersebut, plaintif hendaklah membayar defendan jumlah kontrak tersebut kurang daripada 5%. Dalam tuntutannya ini, plaintif memohon bayaran balik sebanyak RM716,837.50 yang ia bayar lebih kepada defendan dan untuk RM446,081.38 yang ia bayarkan bagi pihak defendan. Plaintif juga menuntut untuk 5% daripada baki jumlah kontrak atas alasan ia kerugian haknya akibat 5% yang kena dibayar kerana kegagalan defendan untuk menyiapkan projek tersebut yang menyebabkan Amsteel menamatkan kontrak utama dengan plaintif. Defendan menafikan tuntutan tersebut dan menuntut balas untuk wang yang tidak dibayar di bawah subkontrak tersebut, ganti rugi untuk penamatan, bayaran balik wang yang dibayar untuk pembelian tiga mesin daripada plaintif dan ganti rugi untuk penahanan oleh plaintif atas kelengkapan dan mesin defendan.

Diputuskan, membenarkan sebahagian kedua-dua tuntutan dan tuntutan balas:

(1) Tidak terdapat keterangan untuk menunjukkan bayaran yang lebih telah dibuat kepada defendan. Berkaitan pembelanjaan yang ditanggung oleh plaintif bagi pihak defendan, terdapat pengakuan oleh defendan yang ia berhutang dengan plaintif sejumlah RM284,533.95. Terma yang dipertikaikan terhadap pembelanjaan adalah berkaitan kerja tinjauan, kimpalan am, pembelian pontun dan perbelanjaan pejabat tapak bina. Hanya perbelanjaan yang ditanggung untuk kerja tinjauan dan kimpalan am dibenarkan. Tidak terdapat bukti pembelian pontun dan tiada bukti perbelanjaan pejabat tapak pembinaan yang ditanggung (lihat perenggan 7-8).

(2) Akibat penamatan kontrak utama dan kerja disebabkan oleh prestasi lemah defendan, plaintif berhak kepada 5% daripada baki jumlah kontrak sejumlah RM2,602,755.78. Jumlah ini berbangkit dengan

menolak jumlah kontrak sijil akhir sebanyak RM4,160,494.22 daripada jumlah kontrak asal sebanyak RM6,763,250. Ia diikuti bahawa defendan tidak berhak kepada ganti rugi untuk penamatan (lihat perenggan 10–11 & 20).

(3) Alasan plaintif bahawa mereka menahan mesin defendan hanya kerana mereka hendak defendan membayar balik bayaran terlebih bayar dan perbelanjaan yang ditanggung oleh pihak defendan tidak membuatkan penahanan tersebut sah. Walau bagaimanapun, memandangkan defendan hanya membuktikan fakta kerugian, tetapi bukan ganti rugi, ganti rugi sebanyak RM50,000 dibenarkan untuk penahanan mesin dan RM1,000 untuk membaiki mesin yang rosak. Begitu juga, ganti rugi sebanyak RM10,000 dibenarkan untuk kerugian pontun. Tuntutan defendan untuk membayar balik sebanyak RM551,262 yang ia bayar untuk membeli tiga daripada mesin plaintif dan tuntutannya untuk RM266,658.88 sebagai baki bayaran yang tidak dibayar terhadap jumlah kontrak juga dibenarkan (lihat perenggan 12, 14, 18 & 19).]

Notes

For cases on termination, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3430–3450.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770, CA (refd)

Guan Soon Tin Mining Corp v Wong Fook Kum [1969] 1 MLJ 99, FC (refd)

George Proctor (YS Woo & Procotor) for the plaintiff.
GT Fernandez (GT Fernandez & Co) for the defendant.

See Mee Chun J:

[1] By letter of award dated 27 October 2006 (B 1–6) the plaintiff was awarded a contract by Amsteel Mills S/B ('Amsteel') for earthwork excavation for a river straightening project at Brookland Banting Selangor ('the contract') for RM6,763,250 ('the contract sum'). By a subcontract dated 15 November 2006 (B 7–11) the plaintiff assigned the contract to the defendant. Clause 3 of the subcontract provided the plaintiff was to pay the defendant the contract sum of RM6,763,250 less 5%. This is the plaintiff's claim essentially for the refund of RM716,837.50 being money overpaid to the defendant ('overpayment') and RM446,081.38 being money expended by the plaintiff on behalf of the defendant. The defendant denies the claim and counterclaims for the balance of the contract sum, damages for termination of subcontract, the return of money paid for the purchase of three machines and damages for retention of the defendant's equipment and machinery.

[2] The plaintiff had its director as witness, Chong Yeek Loi ('PW1' and witness statement marked as WSP1). The defendant had its managing director as witness Hui Hoon Chun ('DW1' and witness statement marked as WSD1). The plaintiff had also called one Wong Weng On general manager of Lion Tin S/B who was sworn in as 'PW2'. However his evidence-in-chief was expunged for reasons to be given in the relevant part of the judgment.

REFUND

[3] On the claim for refund of the overpayment PW1 referred to a letter from Amsteel dated 4 December 2007 (B 48) in which not only had Amsteel terminated the contract it had stated it would be recovering an 'overpayment of RM720,000' and its own letters to the defendant on this matter as in B 42, 45, 49 and 50. A letter of demand through its solicitor dated 3 December 2007(B 46-47) for RM1,162,918.88 (RM766.835.56 for overpayment and RM446,081.38 for expenses incurred on the defendant's behalf) was also referred. It was also stated Amsteel had not sued for the refund of RM716,837.66 (Q&A 33). In cross-examination PW1 was referred to its letter of demand dated 3 December 2007 in which RM766,835.56 for overpayment was demanded and his earlier answer Amsteel had not sued for the refund of RM716,837.66 and it was put to him his answer of RM766,835.56 was wrong to which he disagreed. He said the plaintiff had received a letter of demand from Amsteel but was unsure if it was in the bundles. He also stated Amsteel had sued and it was settled by contra. On his Q&A 33 he said they received a letter from Amsteel for the amount and the plaintiff offered a contra. No summons was issued. PW1 was referred to the statement of final account in B 113–122 ('final account'). When asked if the final contract sum was as at B 114 he was not sure as he had not seen the document. It had been signed by FK Lim ('Lim') on the plaintiff's behalf on 20 May 2009. Earlier on he said Lim was the plaintiff's chief executive and a director and Lim signed the payment advices in B 33–40. He disagreed that since the plaintiff signed the final account it was bound by it. He disagreed there was nothing in the final account regarding overpayment. He was unsure if the final account had been signed by consultant as it was handled by Lim.

[4] In re-examination PW1 stated Lim is no longer with the plaintiff. He was not sure if the plaintiff received the final account from Amsteel as it was not signed by him. He explained the over claim and contra as the plaintiff having been asked to do extra work as compensation as otherwise they will be sued.

[5] At this juncture I turn to PW2 whose evidence was expunged. The plaintiff had closed its case on 28 November 2013 and the matter was fixed for continued hearing of the defendant's case on another date as the defendant witness was unwell. When the case came up for continued hearing the plaintiff

applied to call PW2 to give evidence and this was allowed by the court in the interest of justice. PW2 then proceeded to give evidence on a statement of final account which he signed on 28 October 2009 where the amount certified was RM3,498,917.82. PW2 had also stated he was not aware of the final account as in B 113–122. The plaintiff counsel then sought to tender the statement of final account signed on 28 October 2009 as an exhibit. Oral arguments were made as the admissibility or otherwise of the document. The court did not mark the exhibit and expunged the entire evidence as the document was only produced in court on the date of trial. The final account as produced by the defendant was already known at the discovery stage and therefore available to the plaintiff. The questions put forth to PW1 was whether the plaintiff had signed the final account. The plaintiff had also not alleged the final account was fraudulent. As the evidence-in-chief of PW2 was expunged he was not cross-examined. Accordingly the evidence of PW2 including the final statement of account which he signed on 28 October 2009 will not be considered by the court.

[6] DW1 denied there had been any overclaim. He stated the progress claims were processed and approved by the plaintiff. DW1 also referred to the final account prepared by the consultant Jurutera Perunding Zaaba S/B ('Zaaba').

[7] The final account as in B 113–122 shows no amount of overclaim. It was marked as ID2 as DW1 who sought to tender it was not the maker. However it was PW1's own evidence Lim who was the plaintiff's chief executive and director had signed it. Although PW1 had not signed it and was not sure if Amsteel had sent it to the plaintiff the fact of Lim having signed it has to mean the plaintiff had agreed to it and the fact that there was no over claim reflected in it. The evidence of PW1 is that he agreed with the summary of progress claim as in B 41. There is also no statement of over payment in the summary. There was therefore no evidence to show an over claim made by defendant. PW1 had also given conflicting evidence as to whether Amsteel had sued for the overclaim. His evidence-in-chief was that there was no summons while in cross-examination he said Amsteel has sued and it was settled by contra. In re-examination made a bare assertion Amsteel had asked the plaintiff to compensate by doing extra work. There was also a discrepancy in the amount of over claim: the plaintiff's letter of demand dated 3 December 2007 for RM766,835.56 and PW1's evidence Amsteel had not sued for a refund of RM716,837.66 and this was not explained.

EXPENSES INCURRED BY THE PLAINTIFF ON THE DEFENDANT'S BEHALF

[8] PW1 stated the expenses incurred on the defendant's behalf was as stated in its letter of demand dated 3 December 2007 for RM446,081.38. B 51 is the statement of account with a description of the various items. On this claim it is clear the defendant had through its lawyer's letter dated 24 December 2007 (B 53–54) admitted owing the plaintiff a sum of RM284,533.95. The disputed items with reference to B 51 are items 4 (survey work), 7 (pontoon), 17 and 18 (site office expenses Dec 2007) and 19 (general welding). These items are allowed other than that for pontoon and site office expenses. There was no proof of purchase of the pontoon and no proof of expenses incurred for site office.

CLAIM ON 5% OF BALANCE OF CONTRACT SUM

[9] This claim is premised on the defendant not having completed the project thereby causing the plaintiff to lose its entitlement to 5% of the balance contract sum. The claim turns on the issue whether Amsteel had terminated the contract with the plaintiff as the contact had in turn been assigned to the defendant. The defendant had acknowledged receiving the plaintiff's letter dated 5 December 2007 in B 52 which was to inform of Amsteel's termination of 4 December 2007. According to PW1 DW1 approached him to request Amsteel to reinstate the contract to which Amsteel agreed and they were requested to start work immediately. The defendant failed to do so and by letter dated 25 April 2008 (B 74) Amsteel wrote to the plaintiff to terminate and instructed the plaintiff to cease all operations on site and demobilise the workforce and machinery and hand over the site. Amsteel's termination on 4 December 2007 was not challenged by the defendant nor the fact they had approached the plaintiff to request Amsteel to reinstate the contract to which Amsteel agreed. What appeared to be challenged was the letter dated 25 April 2008 which according to the plaintiff was termination by Amsteel. In para 17 of its defence it was stated the contract was not terminated and the letter dated 25 April 2008 was in respect of non satisfactory work. DW1 in Q&A 10 of WSD 1 stated they had not stopped work and since Amsteel had stopped payment for two months they had cash flow problems and the delay was not 13 months as alleged by the plaintiff in its letter but eight months for which the defendant had written in for an extension. In cross-examination DW1 stated date of completion was 3 April 2007 and there was no reply to the request for extension. When referred to his Q&A 10 he agreed payment was delayed because he stopped work. He agreed there was a delay of eight months and said it was due to technical problems.

[10] Amsteel's letter of 25 April 2008 was a termination as evident from the instruction to 'cease all operations on site and demobilize all your workforce and machineries ... within 2 weeks from the date of this letter and hand over the site'. This coupled with DW1's own evidence there had been an eight month delay and there was no reply to the request for extension shows that letter to be a termination.

[11] The plaintiff is therefore entitled to 5% of the balance contract sum. The contract sum was RM6,763,250 and the final contract sum certified in the final account was RM4,160,494.22 (B 114). The amount in the final account is taken as this court had earlier found it to be signed by Lim who was the chief executive and director of the plaintiff thereby showing the plaintiff had agreed to the contents. The contract sum less amount certified is the balance contract sum of which the plaintiff is entitled to 5%.

COUNTERCLAIM (PARAGRAPH 25)

[12] On para 25(a) for the balance of contract sum of RM266,658.88, DW1 had explained in Q&A 15 this was derived from the final certified amount of RM580,202.98 in the final account and deducting 5% of the plaintiff's commission an amount of RM551,192.83 was arrived at. They then deducted RMRM284,533.95 as what was admitted as owing to the plaintiff to arrive at RM266,658.88. This court takes the figure in B 116 in the final account of RM580,202.98 as the final certified amount due. Accordingly this counterclaim is allowed.

[13] On detention of the defendant's equipment and machinery ('machinery') PW1 had admitted to detaining them and they are with him until payment is made. He denied there had been unlawful detention. The defendant had taken back the machinery after they obtained a court order dated 23 July 2009. He disagreed the period of detention was 20 months; he could not remember how long the plaintiff had detained the machinery. He denied B 81 was the list of machinery detained and it was only three items of spoiled excavators and parts scattered all around. He also disagreed B 82–91 were photographs of some of the machinery at site. DW1 stated all the items in B 81 had been taken back as a result of the court order except item No 18 which is pontoon No 1. He said the pontoon was theirs and the proof was in the photographs. He referred to his police report dated 4 June 2008 (B 79) where he reported the machinery were removed in May 2008. The period of detention from May 2008 until July 2009 was 15 months. He denied the machinery was kept by the plaintiff as they wanted to be paid what was due to them.

[14] The evidence of PW1 is that they detained the machinery but it was only because they wanted the defendant to pay them the over claim and the money they had expended on the defendant's behalf. This however does not make the detention lawful. As to what had been detained this court accepts B 81 to be the list of machinery as this was attached to the court order dated 23 July 2009. The period of detention was 15 months as per DW1's evidence.

[15] On the losses suffered in respect of the machinery being detained which is the unreturned pontoon No 1 DW1 said the estimated cost was RM400,000. Evidence on the loss of use and costs of repair are in Q&A 21 and 24–29. DW1 said when they took back the machinery it was in a deplorable condition and required massive repairs.

[16] This being the defendant's counterclaim the burden is on it to prove its losses. The oft quoted case of *Guan Soon Tin Mining Corp v Wong Fook Kum* [1969] 1 MLJ 99 comes to mind. At p 100 it was stated:

> The respondent as plaintiff of course had to discharge the burden of proving both the fact and amount of damages before he could recover. Where he succeeded in proving neither fact nor amount of damage he must lose the action, or if a right was infringed, he would recover only nominal damages. Where he succeeded in proving the fact of damage but not its amount, he would again be entitled to an award of nominal damages only. ...

[17] The defendant had submitted there was no challenge to DW1's evidence and therefore the evidence ought to be accepted as the losses. *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 was referred to at p 794:

> ... It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. ... It applies with equal force in the trial of civil cases as well.

[18] However the plaintiff had challenged as to whether the pontoon was indeed that of the defendant and the losses in the form of quotations by having them marked as ID. As the court has accepted B 81 to be the list of machinery it accepts that item No 18 which is the pontoon was not returned. The fact of loss but not damage was proved for which there will be nominal damages of RM10,000. The same principle goes for damages arising from detention of machinery where the loss of rental was given only in the form of quotations and global nominal damages of RM50,000 is given. On the cost of repairs which were estimated to be RM1m this was an estimate by DW1 and it his own evidence only two or three units of excavators had been repaired. Nominal damages of RM1,000 is awarded.

[19] On the transfer of three machines purchased by the defendant from the plaintiff and in the alternative the return of the purchase money PW1 had admitted with reference to debit note 0032 in payment advice in B 38–40 the purchase and that the amount paid was RM551,262. He agreed the machines ought to be transferred. He disagreed the plaintiff had failed to transfer because the defendant still owed them money. Based on PW1's own admission the alternative claim for the return of the purchase money of RM551,262 is allowed.

[20] On the damages for termination this consisted of the balance of the contract sum had the defendant been allowed to complete the work, the retention sum and progress claim No 9. The balance of the contract sum and retention sum are dismissed as the contract and therefore the assignment had been terminated for poor performance.

[21] On progress claim No 9 PW1 was referred to the summary of progress claim in B 41 and he agreed with the contents. He said Lion Corp had certified all nine progress claims. He was not sure if all payments had been paid to the plaintiff. When put to him they paid RM3,667,626.24 to the plaintiff he agreed. In re-examination when referred to B 41 and the column 'payment made' he was asked why there was no payment done he replied he could not remember and he was unsure if payment had been received. The progress claim No 9 is based on the summary of progress claim in B 41 the contents of which PW1 agreed with. Although he agreed that he had been paid RM3,667,626.24 the column under 'payment made' in respect of progress claim No 9 shows no payment had been made. As the plaintiff is only to pay on money received on progress claim less 5% commission and there was no proof of payment made this part of the counterclaim is dismissed.

CONCLUSION

[22] The plaintiff's claim in para 8(a) is dismissed as the subcontract is not null and void but terminated as at 25 April 2008, (b) dismissed, (c) dismissed, (d) partially allowed for survey work and general welding, (e) dismissed and (f) allowed on 5% of RM6,763,250 minus RM4,160,494.22.

[23] The defendant's counterclaim in para 25(a) of RM266,658.88 is allowed, (b) dismissed, (c) nominal damages of RM10,000 is allowed, (d) allowed, (e) dismissed, (f), (g) and (h) global nominal damages of RM50,000 is allowed, (i) nominal damages of RM1,000 is allowed, alternative claim in (k) is allowed and (l) interest at 5%.

[24] For avoidance of doubt I add that the defendant's counterclaim in para 25(a) has taken into account the amount of RM284,533.95 which was admitted to be owing to the plaintiff.

[25] After hearing oral submissions the court ordered each party to bear its own costs.

Both claim and counterclaim allowed in parts.

Reported by Ashok Kumar